

**CONYERS/DINGELL DEMOCRATIC SUBSTITUTE
H.R. 3359 "THE MEDICAL MALPRACTICE AND INSURANCE REFORM ACT OF
2005"**

SECTION-BY-SECTION ANALYSIS

Scope. The legislation narrowly defines "medical malpractice action" to cover "licensed physicians and health professionals" for only cases involving medical malpractice. These definitions are intended to include doctors, hospitals, nurses, and other health professionals who pay medical malpractice insurance premiums. See, Sec.107(8).

The Republican legislation is broadly drafted to include HMOs, insurance companies, nursing homes, and drug and device manufacturers for a broad range of liabilities including suits by physicians against those companies. The full extent to which H.R. 5 protects the wrongdoings of these companies is still unknown.

Title I - Reducing Frivolous Lawsuits

Sec. 101 - Statute of Limitations. This section limits the amount of time during which a patient can file a medical malpractice action to the later of three years from the date of injury or three years from the date the patient discovers (or through the use of reasonable diligence should have discovered) the injury. Children under the age of 18 have the later of three years from their 18th birthday or three years from the date the patient discovers (or through the use of reasonable diligence should have discovered) the injury.

*The Republican legislation limits it to the **earlier** of three years from the date an injury "manifests" itself or one year from the date discovered, but in no event can it exceed three years. This makes it more akin to a statute of repose than a statute of limitations. H.R. 5 also establishes a statute of repose for children injured under the age of six that is the later of three years from the date of manifestation or prior to the minor's eighth birthday.*

Sec. 102 - Health Care Specialist Affidavit. This section requires an affidavit by a qualified specialist before any medical malpractice action may be filed. An extension may be granted for such an affidavit if at the time the claim is brought, the claimant has not been able to obtain medical records or other information necessary for the affidavit. A "Qualified Specialist" is a health care professional with knowledge of the relevant facts of the case, expertise in the specific area of practice, and in the case of an action against a physician, board certification in a speciality relating to the area of practice.

*Although the Republicans claim their legislation would limit frivolous claims, H.R. 5 does nothing to ensure that the claims filed by plaintiffs are legitimate. H.R. 5 has no certification process prior to the filing of a medical malpractice lawsuit. H.R. 5 only restricts the rights of injured patients and physicians in **meritorious lawsuits**.*

103 - Sanctions for Frivolous Actions and Pleadings. This section reduces the frivolous lawsuits by requiring that every document in a medical malpractice action be signed by at least one attorney of record. Any unsigned paper is stricken. Second, all plaintiff attorneys who file a medical malpractice action are required to certify that the case is meritorious. Attorneys who erroneously file such a certificate are subject to strict civil penalties. For first time violators, the court shall require the attorney to pay costs and attorneys fees or administer other appropriate sanctions. For second time violators, the court shall also require the attorney to pay a monetary fine. For third time violators, the court shall also refer the attorney to the appropriate State bar association for disciplinary proceedings.

The Republican legislation does not have a provision that directly addresses the filing of frivolous lawsuits. H.R. 5 only restricts the rights of injured patients and physicians in meritorious lawsuits.

Sec. 104 - Mandatory Mediation. This section establishes a mandatory alternative dispute resolution (ADR) system for medical malpractice cases. Participation in mediation shall be in lieu of any other ADR method required by law or by contractual arrangements by the parties. States also have the option to allow arbitration. Any party dissatisfied with the result reached through ADR will not be bound by this result and all statements, offers, and communication made as part of ADR would be inadmissible as part of an adjudication. A similar approach is recommended by the Committee for Economic Development (CED), which suggests that defendants make and victims accept “early offers.” The effect of the “early offer” program, according to the CED, is that defendants will reduce the likelihood of incurring litigation costs, and victims would obtain fair compensation without the delay, expense, or trauma of litigation.

The Republican legislation does not address alternative dispute resolution methods to reduce the number of medical malpractice actions that are litigated. The sole remedy of the Republican legislation is tort reform that will restrict the rights of those who have been legitimately wronged.

Sec. 105 - Punitive Damages. This section limits the circumstances under which a claimant can seek punitive damages in a medical malpractice action. It also allocates 50 percent of any punitive damages that are awarded to a trust fund managed by the Department of Health and Human Services (HHS) through the Agency for Healthcare Research and Quality. The money in the trust fund must be used for activities that reduce medical errors and improve patient safety. The Secretary will promulgate regulations that will establish programs and procedures to carry out this objective. See also, Sec. 221-223.

Under the Republican legislation, drug and device manufacturers have immunity from punitive damages for Food and Drug Administration approved products. This legislation raises the burden of proof for injured patients and caps punitive damages at the greater of twice the economic damages or \$250,000 for all cases.

Sec. 106 - Reduction in Premiums. This section requires medical malpractice insurance companies to annually project the savings that will result from Title I of the bill. Insurance companies must then develop and implement a plan to annually dedicate at least 50 percent of those savings to reduce the insurance premiums that medical professionals pay. Insurance companies must report these activities to HHS annually. The section provides for civil penalties for the non-compliance of insurance companies.

The Republican legislation does not promise or provide any premium relief for doctors.

Title II - Medical Malpractice Insurance Reform

Sec. 201 - Prohibition on Anti-competitive Activities by Medical Malpractice Insurers. This section would repeal McCarran-Ferguson Act to ensure that insurers do not engage in price fixing. The Act, enacted in 1945, exempts all anti-competitive insurance industry practices, except boycotts, from the Federal antitrust laws. Over the years, uneven oversight of the insurance industry by the States, coupled with no possibility of Federal antitrust enforcement, have created an environment that fosters a wide range of anti-competitive practices.

Sec. 202 - Medical Malpractice Insurance Price Comparison. This section creates an internet site at which health care providers could obtain the price charged for the type of coverage the provider seeks from any malpractice insurer licenced in the doctor's state. This section specifies the availability of online forms and that all information will remain confidential.

The Republican legislation does not promise or provide any premium relief for doctors. H.R. 5 does nothing to address the flaws apparent in the medical malpractice insurance marketplace and the regulation of that market. The sole remedy of the Republican legislation is tort reform that will restrict the rights of those who have been legitimately harmed.

Sec. 203 - Procedural Requirements for Proposed Rate Increases. This section allows any health care professional to challenge a proposed rate increase of medical malpractice insurance in a State administrative proceeding. It also requires that before it implements any rate increase, an insurance provider submit to the appropriate State agency a description of and justification for the rate increase.

The Republican legislation does not promise or provide any premium relief for doctors.

Title III - Enhancing Patient Access to Care Through Direct Assistance

Sec. 301 - Grants and Contracts Regarding Health Provider Shortages. This section authorizes the Secretary of Health and Human Services to award grants or contracts through the Health Resources and Services Administration (HRSA) to healthcare providers who choose to work in geographic areas that have a shortage of one or more types of health providers as a result of dramatic increases in malpractice insurance premiums.

Sec. 302 - Health Professional Assignments to Trauma Centers. This section amends the Public Health Service Act to authorize the Secretary to send physicians from the National Health Service Corps to trauma centers that are in danger of closing (or losing their trauma center status) due to dramatic increases in malpractice premiums.

The Republican legislation does not directly address the access to care issue caused by rising malpractice premiums. The sole remedy of the Republican legislation is tort reform that will restrict the rights of those who have been legitimately wronged.

Title IV - Independent Advisory Commission on Medical Malpractice Insurance

Sec. 401-402 - Independent Advisory Commission on Medical Malpractice Insurance. This section establishes the National Independent Advisory Commission on Medical Malpractice Insurance. The Commission must evaluate the causes and scope of the recent and dramatic increases in medical malpractice insurance premiums, formulate additional proposals to reduce those premiums, and make recommendations to avoid any such increases in the future. In formulating its proposals, the Commission must, at a minimum, consider a variety of enumerated factors.

The Republican legislation does not promise or provide any premium relief for doctors. This legislation only addresses tort reform and does not examine other causes of malpractice premium costs.

Sec. 403 - Report. This section requires the Commission to file an initial report with Congress within 180 days of enactment and to file annual reports until the Commission terminates.

Sec. 404 - Membership. This section specifically establishes the number and type of commissioners that the Comptroller General of the United States must appoint to the Commission. Generally, the membership of the Commission will include individuals with national recognition for their expertise in health finance and economics, actuarial science, medical malpractice insurance, insurance regulation, health care law, health care policy, health care access, allopathic and osteopathic physicians, other providers of health care services, patient advocacy, and other related fields, who provide a mix of different professionals, broad geographic representations, and a balance between urban and rural representatives. Members of the commission will be appointed for three year staggered terms.

Sec. 405 - Director and Staff, Experts and Consultants. This section allows the Commission to hire personnel and contract services necessary to perform its duties.

Sec. 406. Powers. This section allows the Commission to secure from any department or agency information necessary to carry out its purpose. It also requires that the Commission be subject to a periodic audit by the Comptroller General.

Sec. 407 - Authorization of Appropriations. This section authorizes that such sums be appropriated to the Commission for five fiscal years.

Title V - Medical Malpractice Insurance Information Administration.

Sec. 501. Establishment. This section creates an administration that will collect and evaluate information on the medical malpractice insurance market. Such information includes the frequency of medical malpractice claims paid, the severity of such claims, the portion of claims paid as settlements, the portion of claims paid as a result of a trial, and the division in claims between economic and non-economic damages. The section also requires insurance companies to submit the above data to the administration and enforces a civil money penalty against those who do not submit the data.

The Republican legislation does nothing to understand medical malpractice insurance markets, and it does nothing to determine why premiums are increasing. It is irresponsible to propose extreme solutions that limit the rights of patients and doctors without first understanding the problem and tailoring an appropriate solution to address it.

Sec. 502 Authorization of Appropriations. This section authorizes appropriations for the administration.